Practical Parental Leave Considerations in the Trump Era

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Agenda

• Trump Administration’s Parental Leave Plan
• What Parental Leave and Other Benefits are Employers Offering?
• Parental Leave Policy Considerations
• Best Practices in Drafting Leave Policies

The Trump Parental Leave Plan
First Republican presidential nominee to propose paid maternity leave
Candidate Trump’s plan lacked details
Campaign website: would provide six weeks of paid maternity leave to new moms (Dads and adoptive parents not covered)
Would pay for program by funds recovered in fighting unemployment compensation fraud

The Trump Plan

Now a Parental Leave Plan: Covers new moms, dads, adoptive parents
Parental leave would be mandatory, but not uniform: “States would be required to provide six weeks of parental leave and the proposal gives states broad latitude to design and finance the program”
Cost: ~$18.5 billion over 10 years
Federal government would set minimum levels for states to maintain in their unemployment trust funds, would pay for $12.9 billion of the plan

The President’s Plan: What’s the likelihood of success?

What Parental Benefits are Employers Providing?

- Ironworkers Union
- Etsy
- Spotify

Most Generous Leave Policies

- 1 year: Bill & Melinda Gates Foundation, Netflix
- 6 months: Ironworkers Union, Etsy, Spotify, Amazon, American Express, Twitter, Microsoft
- 5 months: Amazon, American Express
- 4 months: Nike, Adobe, Goldman Sachs, Yahoo
- 18 weeks: Starbucks, Bank of America
- 17 weeks: Johnson & Johnson, Facebook/Instagram, Reddit
- 12 weeks: Starbucks, Google

Compare DMEC Survey Results:
45% have no plans to create a company policy

“Other” Parental Leave Benefits

Amazon

- **Leave Share**: Employees can share paid leave with their partners
  - Employees can share up to six weeks of parental leave with their partner
  - New mom could use 14 weeks of paid leave and give her partner the value of the remaining six
  - The new mom returns to work and six weeks added to her next paycheck
- **Ramp Back**: Helps new moms and primary caregivers ease back into the workplace. Over a period of eight weeks, new parents can work at a reduced schedule as they become re-acquainted to work

Source: www.entrepreneur.com/slideshow/249467#0 and 2016 DMEC Leave Management Survey
"Other" Parental Leave Benefits

Google
- Priority placement at Bright Horizon child care centers across the U.S.
- $500 in “baby bonding bucks”

Yahoo
- Offers employees additional $500 to help with any expenses related to the newborn

Netflix and Virgin: Unlimited time off

Facebook
- Subsidizes adoption programs, child care, surrogate parenting, sperm donation and egg freezing initiatives

Bank of America
- Reimburses eligible employees up to $8,000 per legally adopted child
- Pays for up to 25 days of childcare center babysitting for kids ages six weeks to 12 years of age if primary caregiver is temporarily unavailable during work hours (e.g., sick or on vacation)
- Reimburses employees up to $240 a month per child for childcare costs incurred while working

Johnson & Johnson: Grocery and laundry pick-up services

Twitter
- Hosts new parent and new parent-to-be roundtables on a quarterly basis
- During the meetups, moms and dads ask questions about leave and swap war stories from the messy trenches of parenthood

Goldman Sachs
- Breastfeeding new mothers enjoy around-the-clock access to lactation consultants and on-site lactation rooms

GoDaddy: Ships breastmilk home
Unlimited Leave Policies

Pros
• Employees decide when and how much to take
time off without any advance approval
• Trust in employees that work is up to date and
that the absence will not damage the business
(e.g., “Act in Netflix’s best interests.”)
• Leads to a more engaged workforce --
management is trusting employees to manage
their own time in a way that serves their personal
needs while still getting the work done
• Key selling point for their current and potential
employees
• No rush at the end of the year to take unused time
that does not carry over
• No tracking required!

Cons
• Employers ability to track attendance
for performance reasons significantly
diminished
• Jobs within the same workplace have
different expectations for what
“reasonable” unlimited amount of leave
might be; potential morale issues
• Not necessarily popular with long-
tenured employees
**Unlimited Leave Policies**

Unlimited leave policies have the potential to hamstring vigilance on absenteeism issues; employers must remain proactive.

- FMLA Administration nightmare – how to track where FMLA and other statutory leave required
- “Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.” 29 CFR § 825.207(a)
- FMLA vs. the dream vacation: Do you pay for one but not the other?

**Mom v. Dad Policies**

- Historically, employers have provided maternity leave to moms who have given birth
- Often through STD benefit programs
- Recent trend to offer benefits to both mom and dad
- Tendency to provide greater benefits to mom vs. dad
- EEOC Guidance:
  - Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions
  - Parental (bonding) leave must be provided to men and women on the same terms

- EEOC:
  - Carefully distinguish between: 1) leave related to physical limitations; and 2) bonding leave
  - If an employer extends leave to new mothers beyond the period of pregnancy/recuperation from childbirth (e.g., to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose
Concurrent Session – Tuesday, 3:00-4:00 pm

EEOC Pregnancy Guidance

EXAMPLE 14
Pregnancy-Related Medical Leave and Parental Leave Policy – No Disparate Treatment

• Employer offers pregnant employees 10 weeks of STD benefits
• Also offers six weeks of parental leave
• Male employee alleges that this policy is discriminatory
• Policy does not violate Title VII
  • Women and men both receive six weeks of parental leave
  • Women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth

EEOC Pregnancy Guidance

EXAMPLE 15
Discriminatory Parental Leave Policy

• In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, employer provides six additional months of paid bonding leave for new mothers
• Does not provide paid parental leave for dads
• Policy violates Title VII because it does not provide paid parental leave on equal terms

Caregiver Policies

• Shifts away from mom v. dad; rather, focus on who is providing primary care for the child
• Typically defined as the parent who takes primary responsibility for care of the child during typical work hours
• Usually involves statement or affidavit of individual attesting to caregiver responsibilities
• Administrative issues
  • How to administer
  • Stereotype that mom is the primary caregiver
Legal pitfalls: Caregiver Policies

Rotondo v. J.P Morgan Chase

- JPM: Provides 16 weeks of paid leave for a “primary caregiver” who has a new child through birth or adoption
- The parent considered the “non-primary caregiver” is granted only two weeks of leave
- Employee asks human resources to classify him as the primary caregiver so he could take the full 16 weeks.
- Employer: policy considers the birth mother the primary caregiver, and dad can only obtain extended leave if his spouse returns to work early or is medically incapable of caring for the child

- Derek Rotondo: fraud investigator for JPM
- Alleges JPM told him:
  - Bank policy considers the birth mother the primary caregiver
  - The father can only get the extended leave if his spouse returns to work early or is medically incapable of caring for the child
  - His wife is a teacher who is off for the summer as part of her normal schedule
  - Alleges that the bank has discriminated against him and other fathers because of presumption that biological mothers are the primary caregivers

Best Practices: Policy Drafting
Best Practices: Policy Drafting

**Unlimited**

- “We believe you should take responsibility for managing your own time and to openly communicate with colleagues to support one another whenever possible with workload...”
- “This policy is based on mutual trust between [Employer name] and its employee. It gives employees opportunities to work or take time off as they see fit, as long as they keep fulfilling their duties...”
- “We’ve adopted an unlimited vacation policy for our [exempt] employees where each employee is afforded the flexibility to take planned vacations as needed...”

For illustrative purposes only.

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**Unlimited**

- Supervisors can consider rejecting vacation requests if:
  - Colleagues with similar or complementary duties have already asked for leave during the same time.
  - The time in question is too busy or includes an important deadline for the employee asking for leave.
  - An employee appears to abuse the policy.
    - **Note**: Require managers have to prove abuse of time, using data and presenting employees’ inadequate deliverables. HR also should be involved.

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**Unlimited**

- Employees are required to:
  - Avoid abusing the policy by taking time off that negatively impacts their job and the [employer].
  - Communicate and collaborate with their team to ensure everyone takes leave without disrupting operations.
  - Plan to delegate, postpone or otherwise manage projects that will be affected by their time off.
  - Notify their supervisors at least two weeks in advance.
Best Practices: Policy Drafting

**Unlimited**

- Employees don’t accrue time-off so the [employer] will not compensate unused leave
- Employees should use common sense and adhere to company policies when requesting vacation leave. Effective communication between team members is vital to make this policy work for everyone
- Other considerations:
  - How do you handle short-term leaves?
  - Requiring a minimum number of vacation days to be used

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**Moms v. Dads**

- Decide whether you will differentiate between mom and dad
- If yes, leave set aside for mom must make clear it is provided for pregnancy, childbirth and recovery or related medical conditions
- Consider splitting up the benefit in your policy
  - Maternity leave: only for pregnancy, childbirth and recovery or related medical conditions
  - Parental leave: leave provided to parents to bond with the child

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**Caregivers**

- Define caregiver
- Examples:
  - A Primary Care Giver is defined as a parent who has the primary responsibility for the care of the child immediately following the birth
  - For the purposes of this policy, primary caregivers are defined as the parent who has greater than 50 percent of responsibility in caring for the recently born or adopted child.
- Certification of primary caregiver status
Concurrent Session – Tuesday, 3:00-4:00 pm

Best Practices: Policy Drafting

Caregivers
- Do not make presumptions on who the primary caregiver is
- Require communication in the event caregiving relationship changes
- Strong provision regarding misuse of leave
  - Travel during leave
- State law – how does policy comply?
- Whether leave is concurrent with other leave?

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